SUPREME COURT U. S.

OCT 2 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

No. .....

In the Matter of

GEORGE CAMPBELL PAINTING CORP.,

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Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This jurisdictional statement covers two appeals from the New York State Court of Appeals, both of which involve identical questions. Rule 15(3) Supreme Court Rules.

Opinions Below

In the Appendix are reprinted the opinions in the Special Proceeding commenced pursuant to CPLR, Article 78, in the Supreme Court, New York County: 48 Misc. 2d 544, 765 N.Y.S. 2d 304, the Appellate Division, First Department, 275 N.Y.S. 2d 363 (not officially reported), and the Court of Appeals, 20 N.Y. 2d ——.

Also reprinted are the opinions in the plenary action in the Supreme Court, New York County, unofficially reported in New York Law Journal, March 8, 1966, the Appellate Division, First Department, 26 A.D. 2d 912, 275 N.Y.S. 2d 365, and the Court of Appeals, 20 N.Y. 2d ——.

In addition, there is added hereto the Court of Appeals opinion in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, decided together with these cases, and on which the Court of Appeals relied in its decision.

Jurisdiction

(i) In both cases the constitutionality of a state statute, Public Authorities Law §§2601-2 was challenged but upheld in the state courts. They provide for automatic disqualification from doing business with the state upon refusal to waive, in advance, the privilege against self-incrimination. One proceeding was brought pursuant to Article 78 of the New York State Civil Practice Law and Rules to review an official determination that resulted in a five year disqualification of appellant's eligibility to bid on public contracts as well as the cancellation of appellant's three out-

standing contracts. The official determination was that one of appellant's officers had violated the provisions of §2602 and had caused a breach of the contract provisions made mandatory by §2601. That proceeding was dismissed (48 Misc. 2d 544, 265 N.Y.S. 2d 304) with leave to prosecute a plenary action for breach of contract. The other case here is the plenary action.

(ii) The judgment sought to be reviewed was made and entered on July 7, 1967, by the New York State Court of Appeals. It held that the statute was constitutional. The notice of appeal was filed on September 18, 1967 in the Supreme Court of the State of New York, to which the record in this case had been remitted by the Court of Appeals on July 7, 1967.

(iii) The jurisdiction of this Court over this appeal is conferred by 28 U.S.C. §1257(2).

(iv) The cases believed to sustain this Court's jurisdiction are: *Slochower* v. *Board of Education of N. Y.*, 350 U. S. 551, 100 L. ed 692, 76 S. Ct. 637 (1956); *Schroeder* v. *New York*, 371 U. S. 208, 9 L. ed 2d 255, 83 S. Ct. 279 (1962); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U. S. 94, 97 L. ed 120, 73 S. Ct. 143 (1952).

(v) The validity of the New York State Public Authorities Law §§2601-2 is involved. The complete text is set forth in the appendix. It is published in McKinney's Consolidated Laws of New York Annotated, Book 42, Part 2, pp. 415-17.

Questions Presented

1. Whether the 14th Amendment is offended by New York State's Public Authorities Law, §§2601-2, which require the disqualification of a corporation from eligibility to bid on public contracts when one of its officers or directors asserts his privilege against self-incrimination when called before a grand jury?

(a) If not, does the fact that the recalcitrant witness resigned his office and surrendered his control of the company's affairs prior to being called as a witness make the application of the statute repugnant to the 14th Amendment?

2. Whether New York State's statutory requirement, Public Authorities Law §2601, that all public contracts contain an agreement to waive the privilege against self-incrimination, is an unconstitutional condition of doing business with the state and its agencies?

Statement of the Case

The appellant is a corporation engaged in the painting contracting business. A substantial portion of its business consisted of work done for the State of New York, its agencies and public authorities. Since 1959, when §§2601-2 of the Public Authorities Law went into effect, all of the contracts with public authorities on which appellant was the successful bidder were required to provide that if a grand jury conducts an investigation into its affairs, all of its officers and directors must testify and waive their privilege against self-incrimination or the contracts will be cancelled,

and appellant's name will be placed on a blacklist and it will suffer a five-year disqualification of eligibility to bid on any public contracts.

In the spring of 1965, a grand jury was convened in New York County to investigate possible irregularities in bidding on public contracts. All of appellant's officers and directors agreed to testify and waive the privilege against self-incrimination. On April 13, 1965, one of appellant's former officers* refused to waive his privilege against self-incrimination.

He was not asked any questions and he did not refuse to answer any questions. Yet, because he wouldn't waive his privilege in advance, appellant was vicariously penalized.

Appellant challenged the blacklisting in the two proceedings on appeal here. In the Article 78 proceeding appellant sought a hearing to review the disqualification. Appellant argued that the blacklisting was improper because, strictly construed, the statute did not apply to the appellant because the recalcitrant witness was not an "officer or director" at the time he refused to waive his privilege. This was the first case that sought to construe the statute. If the statute was construed as inapplicable to appellant then none of the constitutional problems would have to have been reached. Appellees moved to dismiss the proceeding, and Mr. Justice Tilzer granted the motion,

* The officer in question had resigned and surrendered his 10% stock interest prior to being subpoenaed to testify. He did this because of the statute and in an attempt to avoid injury to the five other stockholders and four other officers, all but two of whom derived their livelihood from appellant.

holding that appellant had a more adequate remedy in a plenary action for breach of the cancelled contracts in which it could also have sought equitable relief (*infra*, p. 15). An appeal was taken and a plenary action was commenced for breach of contract.

In the plenary action appellant moved for a preliminary injunction. In urging the court to construe the statute strictly, appellant argued that such a construction was salutary because

> "Respondents' interpretation of the statute [that a former officer could, for selfish reasons, cause a corporation to be disqualified] would give to one person the right, arbitrarily, to forfeit another's property. This raises serious constitutional questions of due process. It is not likely that the New York State Legislature could have intended such an unfair result, especially one so fraught with constitutional problems." (Appellant's Brief to the Supreme Court, New York County, in the plenary action, p. 17.)

This was how the constitutional question was first raised.

The lower court refused to grant a preliminary injunction and also refused to dismiss the complaint. Mr. Justice Schweitzer simply stayed the action pending the outcome of the appeal from the dismissal from the Article 78 proceeding. Again the decision did not deal with the merits of appellant's contentions (*infra*, pp. 16-17).

Appeals from both lower court determinations were consolidated for argument before the Appellate Division of the Supreme Court. Appellees lodged a cross-appeal in the plenary action. Appellant again argued that the court

should adopt a strict construction of the statute to avoid the constitutional issue, but if the court construed the statute as applicable to appellant, then it should refuse to enforce it because it was repugnant to the 14th Amendment. Thus, appellant's briefs in both cases contained as its first argument:

> "POINT I(a) The disqualification of [appellant] is unauthorized by the Public Authorities Law; or (b) The statute is repugnant to the federal and New York State Constitutions".

The argument urged by appellant was:

> "No wrongdoing can be imputed to the assertion of constitutional rights. *Griffin* v. *California*, 38 U. S. 609, 14 L. ed 2d 106 (1965); *Steinberg* v. *United States*, *supra*. The operative wrong here can only be argued to be lack of candor. See separate opinion by Mr. Justice Frankfurter in the *Beilan*, *supra* and *Lerner*, *supra*, cases at 375 U. S. 410, 2 L. ed 2d 1433. In fact, the Court of Appeals has held that mere refusal to waive immunity cannot even be deemed a refusal to be candid. *In re Grae*, 282 N.Y. 428 (1940). In any event, petitioner has not been guilty of any lack of candor and should not be penalized". (Page 16 of Appellant's Brief to the Appellate Division in both cases.)

It is not clear whether the Appellate Division rejected this argument. It appears from its decisions (*infra*, p. 17) that it deemed the contracts, which contained the provision required by §2601, to have estopped appellant from complaining.

Further appeals, one by permission and one as of right, were taken to the Court of Appeals. In the interim, on January 16, 1967, this Court announced its decision in

Spevack v. *Klein,* 385 U. S. 511, 17 L. ed 2d 574, 87 S. Ct. 625. Consequently, the arguments presented by appellants to the Court of Appeals had an additional dimension based on the argument that the *Spevack* case was controlling.

On July 7, 1967, the Court of Appeals affirmed the dismissal of both proceedings, stating:

> "We hold that Section 2601 of the Public Authorities Law is constitutional (*Matter of Gardner* v. *Broderick,* 20 N.Y. 2d 227 [decided herewith])".*

The Substantial Federal Question

The federal question raised is whether the assertion of the constitutional privilege against self-incrimination before the grand jury may, without more, result in a penalty, automatic disqualification from bidding on public contracts.

The ruling by the New York Court of Appeals in this case departs from well imbedded precedents in this Court that the assertion of the privilege may not, by itself, result in a forfeiture or penalty.

In *Slochower* v. *Board of Education,* 350 U. S. 551, 100 L. ed 692, 76 S. Ct. 637 (1956) this Court held that the mere assertion of the privilege, without more, could not result in automatic dismissal of a public school teacher. In later decisions, *Beilan* v. *Board of Education,* 357 U. S. 399, 2 L. ed 2d 1414, 78 S. Ct. 1317 (1958) (public school teacher), *Lerner* v. *Casey,* 357 U. S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311

* The opinion in *Gardner* v. *Broderick* is reprinted in the appendix, *infra,* pp. 20-23.

(1958) (subway conductor), *Nelson* v. *Los Angeles,* 362 U. S. 1, 4 L. ed 2d 494, 80 S. Ct. 527 (1960) (social workers), and *Kimm* v. *Rosenberg,* 363 U. S. 405, 4 L. ed. 2d 1299, 80 S. Ct. 527 (1960) (deported alien), this Court distinguished between dismissal based solely on asserting the privilege and dismissal where the questions which were not answered bore upon the person's qualifications. Thus, it was lack of candor that justified the dismissal, and, without more, the assertion of the privilege could not be equated to a lack of candor. Until now this had also been the view of the New York courts. *In re Grae,* 282 N. Y. 428 (1940).

Recently, this Court, far from departing from these principles, has cast doubt on even the limited rationale in *Beilan, Lerner, Nelson* and *Kimm.* Thus, in *Malloy* v. *Hogan,* 378 U. S. 1, 8, 12 L. ed 2d 653, 84 S. Ct. 1489 (1964), this Court stated that the privilege meant "the right to remain silent * * * and to suffer no penalty * * * for such silence".

In *Griffin* v. *California,* 380 U. S. 609, 14 L. ed 2d 106, 85 S. Ct. 1229 (1965), this Court stated that anything that makes the assertion of the privilege costly "cuts down on the privilege".

Malloy and *Griffin* were criminal cases, as was last term's decision in *Garrity* v. *New Jersey,* 385 U. S. 493, 17 L. ed 2d 562, 87 S. Ct. 616 (1967) in which the privilege against self-incrimination was held to be a right "of constitutional stature whose exercise a state may not condition by the exaction of a price".

But, last term this Court also declared the Feinberg Law unconstitutional in *Keyishian* v. *Board of Regents,* 385

U. S. 589, 17 L. ed 629, 87 S. Ct. 675 (1967), overruling *Adler* v. *Board of Education,* 342 U. S. 485, 96 L. ed 517, 72 S. Ct. 380 (1952), which not even *Slochower* had suggested. And, in *Spevack* v. *Klein,* 385 U. S. 511, 17 L. ed 2d 574, 87 S. Ct. 625 (1967), this Court overruled *Cohen* v. *Hurley,* 366 U. S. 117, 6 L. ed 2d 156, 81 S. Ct. 954 (1961) holding that even when questioned on matters relating to his qualifications, a lawyer's refusal to answer on the basis of his privilege against self-incrimination could not result in the revocation of his license to practice.

In spite of this trend, the New York Court of Appeals has in this case sanctioned the disqualification of a company where its former president was not even asked any questions. The disqualification was solely because he refused to waive his privilege in advance.

The statute that the Court of Appeals upheld was designed for no other purpose than to make assertion of the privilege costly. Disqualification is automatic only when the privilege is asserted or its waiver is refused. Indeed, upon indictment for bribery or other corrupt practices, there is only discretionary refusal to accept bids. *Matter of Zara Contracting Corp.,* 45 Misc. 2d 497, 257 N.Y.S. 2d 479 (Sup. Ct. Alb. Co. 1964), aff'd 23 A.D. 2d 718, 257 N.Y.S. 2d 118 (3d Dept. 1965); *Caristo Const. Corp. v. Rubin,* 10 N. Y. 2d 538, 225 N.Y.S. 2d 502 (1962). There is not even a statute making conviction of such a crime an automatic disqualification. Automatic disqualification results only from asserting the privilege.

Moreover, since the statute deals solely with testimony before the grand jury, it has none of the positive features

discussed in *Beilan, Lerner, Nelson* and *Kimm* and by the dissenters in *Spevack*. Grand Jury testimony is secret under New York's Code of Criminal Procedure, §258. The District Attorney may not disclose a witness' testimony to the interested government agency regardless of how it bears on the witness's qualifications.

Not even the dissenting opinions in *Spevack, Garrity, Keyishian, Malloy* and *Griffin* suggest doing away with the *Slochower* doctrine. Yet the Court of Appeals has done just that. It states in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, decided together with the instant case, that witnesses have "no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties". By citing *Gardner* as the basis of its holding in these cases, the court has equated a refusal to sign a waiver of the privilege in advance with a refusal to be frank and candid, even though no question was asked and no answer refused.

The foregoing are substantial federal constitutional issues inevitably posed by this appeal. In addition, two subsidiary questions also pose substantial federal questions.

First, if the statute is unconstitutional, can contracts containing its mandatory language nonetheless be enforced? Since the Court of Appeals held the statute constitutional, it did not reach this issue. The Appellate Division did not seem to think it had to even reach the constitutionality of the statute because of the existence of the contracts.

Second, even if the statute is not invalid for the reasons expressed above, is it repugnant to the due process clause insofar as it has been applied to a corporation because of the acts of a former non-controlling officer? The Court of Appeals held that due process was satisfied by the procedure in §2603 for discretionary reinstatement. It rejected appellant's contention that discretionary reinstatement is no remedy for erroneous disqualification and is offensive to accepted notions of due process.

Conclusion

For the reasons stated above, it is prayed that this Court determine that it has jurisdiction over this appeal.

Respectfully submitted,

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